IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH MASSARO, :

Petitioner :

v. : No. 01-1559

UNITED STATES. :

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Washington, D.C.

Tuesday, February 25, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

APPEARANCES:

HERALD P. FAHRINGER, ESQ., New York, New York; on behalf of the Petitioner.

SRIKANTH SRINIVASAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:13 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 01-1559, Joseph Massaro versus The United States.

Mr. Fahringer.

ORAL ARGUMENT OF HERALD P. FAHRINGER

ON BEHALF OF THE PETITIONER

MR. FAHRINGER: Mr. Chief Justice, and may it please the Court:

We urge that the appropriate rule for the resolution of ineffective assistance claims of counsel guaranteed by the Sixth Amendment to the United States Constitution is best handled in a collateral proceeding in the first instance, without first resorting to direct appeal and, if that claim might qualify for direct appeal, it should not be a procedural bar.

QUESTION: What is the source of -- of law for our decision? Is it our supervisory powers, whatever we think best, or --

MR. FAHRINGER: Well, certainly, Your Honor, that is implicated, your supervisory powers. I also think that under the Fifth Amendment, which has often been construed to contain the equivalent of equal protection of the law, that this is a circumstance, with the division in

the circuit, that calls out for uniformity.

QUESTION: Well, you -- you're saying that if there's a circuit different, there's a denial of equal protection of the law under the Fourteenth Amendment?

MR. FAHRINGER: In this circumstance, Your Honor, and I'm not urging the Fourteenth Amendment. What I'm urging is, you have in the past had this circumstance with, for instance, the Wade hearings, where it was deemed necessary that you unify the system in the country so that there is the equal protection, particularly in an area as important as criminal prosecution. Certainly, we would all agree that the -- the most important right a defendant possesses in a criminal proceeding is the right to effective assistance of counsel --

QUESTION: Well, you know, that's why we grant certiorari in cases, because we don't think one -- one rule should be -- obtained in New York and another rule in New Orleans, but I don't think we ever thought it was the Equal Protection Clause that --

MR. FAHRINGER: Well, Your Honor, if -- if I've overstated, that I apologize, but certainly under your supervisory powers, I think that this case calls for unity.

QUESTION: We could unify it the way that you don't want.

MR. FAHRINGER: Well, I -- I appreciate that, Your Honor. I -- I would urge that it is -- it lends some force to our argument up here that certainly a majority of the circuits and the highest courts of 36 States have embraced the collateral review, and -- and the reason --

QUESTION: Well, let -- would -- would it ever -- would the basis for an inadequate assistance of counsel claim ever be apparent on the trial court record without resort to extrinsic evidence?

MR. FAHRINGER: I don't think so, Your Honor. I think that --

QUESTION: Never?

MR. FAHRINGER: -- it -- there may be one, one rare case, but -- as Judge Easterbrook in the Seventh Circuit said so eloquently, and that is that in the -- because of the unique nature of the ineffective assistance of counsel, because of the relationship between the attorneys, and the -- and so much is a matter of omission and the confidential relationship that he stated in every case there is something that you could do to add to the record that might reinforce the claim. The Second Circuit, most respectfully, Your Honor, has said that only in a very few cases would it be completely clear on the record.

The other reason that I think this rule is

superior to the procedural default rule is that it would bring certitude to this area, where people would know with some degree of confidence that it should be brought in a collateral proceeding. It has the element of efficiency, in that it brings together in the 2255 proceeding all of the ineffectiveness claims, so they can be resolved in an adversary hearing, which is certainly the best method of raising these claims, particularly when you need a full record.

QUESTION: Is your position that it's 2255 only, or that it is the new counsel's option whether he thinks it's appropriate to raise the ineffective assistance claim on direct appeal, or whether he thinks it's best to wait until the 2255 stage?

MR. FAHRINGER: Yes.

QUESTION: Or are you saying he can't bring it earlier, even if he thinks that --

MR. FAHRINGER: No, Your Honor, I think it should be an option. I don't think we can ever stop a defendant from raising it on direct appeal if he makes that choice. He -- he assumes the risk, then, most respectfully, that he -- it -- it will be resolved, whether he could have expanded the record or not, but my -- my suggestion to the Court is, and I think logic supports me in this respect, that with the 2255 collateral

available to him proceeding, that certainly the overwhelming majority of cases would be brought in that forum.

QUESTION: But there's something to be said for winding the thing up and getting it over with, isn't there?

MR. FAHRINGER: But those fears, Your Honor, that were expressed in Frady, for example, have not been pretty much put to rest by AEDPA, because now you have a statute of limitation, so that these are not going to go on and on. As a matter of fact, if you --

QUESTION: If you -- if you have a choice between two proceedings and one proceeding, certainly there's something to be said for one proceeding, although your argument is that one proceeding simply isn't as effective as two, but I think you have to recognize that all things being equal, it would be better having one proceeding than two.

MR. FAHRINGER: And -- and that one proceeding, Your Honor, I -- I understand with the exception of an individual choice that one proceeding really should be the 2255. What I might say, as an example to this Court, think of the dilemma a defense lawyer faces in the Second Circuit where one, if he sees evidence of ineffectiveness but it's not fully developed, and he doesn't raise it

because he doesn't think he's obliged to, there's a risk of procedural default.

If he does raise it and it's not been fully developed, it may be resolved by the court on a partial record, whereas if he'd been in a 2255 proceeding, he could have expanded and amplified the record, which would have strengthened the claim.

The third option is, that the Second Circuit seems to direct is, raise it at the earliest possible moment, identify it, and then perhaps we will send it back for remand. Well, that, that seems to just complicate the matter.

And then finally, Your Honor, I think one of the most compelling arguments, which the Solicitor General agrees with, that this would put an end to needless expenditure of judicial resources on resolving the -- the cause and prejudice rule. Remember, in a circuit like the Second Circuit, every single man, woman that goes into a 2255 proceeding because they have this direct appeal rule as an exception must establish cause and prejudice at the threshold.

QUESTION: Well, not -- not everyone. I -- I mean, only one who -- who got new counsel on the direct appeal.

MR. FAHRINGER: That's right, Your Honor. I'm

sorry. I'm speaking in the terms of that. Obviously, if you had the same lawyer, that would -- Your Honor, that would really be cause, so it may be that he would be able to easily overcome the cause aspect, but he still has the prejudice aspect that he has to establish.

In the other circuits, he can go right in on a 2255, and -- and 2255 itself says that unless it's conclusively established that his -- his papers are without merit, a hearing shall be granted, so there's a terrible disparity in the way defendants are treated who are trying to -- to restore this most important right.

QUESTION: Suppose you have a case where -- and you stated earlier that this doesn't happen very often, but suppose it's evident on the face of the record that the counsel was ineffective. He stands up and says on the record, Your Honor, I wish the record to show I've been asleep for an hour during the key cross examination.

Isn't it there also an efficiency in just sending it back for new trial right away, rather than going through all of the other claimed errors?

MR. FAHRINGER: Well, Your Honor, I think yes. I --

QUESTION: I mean, if it's evident that the case has to go back, why have the district court -- or, pardon me, the appellate courts examine the entire record and --

and give a lengthy opinion that's obviously going to be unnecessary?

MR. FAHRINGER: And Your Honor, I hope I'm answering your question, because I want to be direct. You avoid that by the 2255 collateral review rule. Right now, the Second Circuit is involved in a large number of cases where they come up and they just say, well, this really should go back, and -- and that -- that prolongs the appellate process.

QUESTION: Well, I'm a little confused on the same point. I thought that, suppose -- does -- would you say that a defendant is forbidden to raise an ineffective assistance claim on direct appeal?

MR. FAHRINGER: No.

QUESTION: No. You're just saying that if he doesn't, you can -- he can raise it later in 2255.

MR. FAHRINGER: That's right.

QUESTION: And the appellate court can't say to him, oh, you should have raised it earlier, so you're out?

MR. FAHRINGER: Precisely, Your Honor. The --

QUESTION: All right, and so all we're doing is defining the -- the scope of the procedural bar rule when a person goes into 2255. We're not controlling what he says on his appeal.

MR. FAHRINGER: That's correct, Your Honor,

and --

QUESTION: We're not.

MR. FAHRINGER: -- it seems to me that if -- but please understand, I think I have to say in all fairness, if he takes and goes up on the direct appeal with his ineffectiveness claim and the appellate court resolves it, then he may be barred.

QUESTION: Yes, so -- so in other words, if he chooses to go and appeal, direct appeal --

MR. FAHRINGER: Yes.

QUESTION: -- he's not going to be able to make exactly the same claim later in 2255.

MR. FAHRINGER: Precisely.

QUESTION: But if he doesn't make it on direct appeal, you want him to be able to make it on 2255 and not be met with the argument, oh, you should have brought it on direct appeal.

MR. FAHRINGER: Your Honor, in response to that, there really is --

QUESTION: Yes, all right. I --

MR. FAHRINGER: -- unanimity among all of the circuits that the best forum -- the best -- the Second Circuit agrees with this, too. The best forum for resolving ineffectiveness claims is in the collateral proceeding, when you have access to discovery.

QUESTION: May I ask you about this -- this possibility? Sometimes there are -- there are claims in which there are two bases for challenging the competence of counsel. Assume that one of them is plain on the face of the record, he didn't object to -- you have a whole bunch of, line of interrogation was plainly improper, and the second ground is not plain on the record. Supposing he raises the first ground on direct appeal and loses. Is he barred, in your view, from raising the second ground on collateral review?

MR. FAHRINGER: No, Your Honor. He would be able to do that. The -- the -- but if I may, Your Honor, that's triggered another grave concern here. In -- under Strickland you indicated that, you know, ineffectiveness claims really should be judged in aggregate because one lends force to another. It ought to be the overall performance of the attorney.

What you have in the Second Circuit now is the very piecemeal type of resolution of ineffectiveness claims that you just described. What has actually happened, and we cite the cases in our brief, they take one because that's, they say is fully developed on the record. They resolve it. Two more go back down to the 2255 proceeding, and that seems to be in direct defiance of the spirit, at least, of the Strickland rule that they

should all be decided together in one proceeding, and so that, you know, it's -- the -- the powerful arguments of efficiency, simplicity, and fairness to all parties seems to -- to argue for the -- the collateral review rule.

The only argument they lean against this is this notion of -- of finality, but -- but I submit to the Court most respectfully that that's an -- that's in a -- an almost nonexistent, narrow margin of cases, because there's always more you're going to develop on the record. The lawyer's explanation, for instance, you know, you never have that --

QUESTION: Well, you know, you could go -- you could have an entire separate proceeding, Mr. Fahringer, and just have exhaustive discovery and so on, but there -- there comes a time when there is an interest in finality, that you don't want the thing just postponed to another day, which this does.

MR. FAHRINGER: But Your Honor -- and -- and I welcome that question, Mr. Chief Justice, and that is this, that if, as the Second Circuit itself says, it is only in a very few cases where it would be fully developed on the record, that seems to me to be a small price to pay for a much simpler, more straightforward rule that everybody knows where they stand. Lawyers are not struggling with this decision in the Second Circuit,

should I raise it, should I not raise it, am I at risk, and now what you've done is, under the Second Circuit's rule is, you have spawned a whole generation of -- of second ineffectiveness claims, because if the lawyer doesn't raise it and the defendant understandably says, well, you should have raised it because they say it was fully developed on the record and you thought it wasn't, now you have another whole level that is added to this, so the complexity is staggering that is developed.

QUESTION: Mr. Fahringer, is -- does AEDPA require that all such claims have to be brought within 1 year in any event?

MR. FAHRINGER: It does in this respect, Your Honor, yes, because as a practical matter now, under AEDPA as it had amended 2255, if you bring an ineffectiveness claim in a 2255 proceeding, and they are resolved, and you want to try to bring another one, you have to get permission of the circuit court, of course, so you've got some control over it, and -- and then all claims have to be brought within a year in any event, so the fears that were expressed in Frady have been put to rest, I believe, and there's really no good reason. I -- I think the reason the Solicitor General endorsed this rule for over 20 years, and they've changed their mind now, but certainly we've cited case after case where they argued to

this Court that -- that this is the best way to do it, to bring it in a collateral proceeding, because that is the fairest, the simplest.

QUESTION: Am I right in thinking that most cases, even in the Second Circuit, do go into the 2255 mold, because in most cases it will not be clear on the record, and the Second Circuit rule that you must bring it on direct review applies only when it is clear, the ineffectiveness is clear on the record, if you need to look outside the record, then the Second Circuit agrees it doesn't belong on direct review?

MR. FAHRINGER: Your Honor, in all due respect, I'm not sure that's right. Since Billy-Eko came down, 35 cases that we were able to find in addition to this one were defaulted, because the Second Circuit said it should have been brought, there was enough on the record. So this is a terribly ambiguous and controversial -- and we don't know how many cases where district courts just simply issued an order. These are written opinions, many of them, Your Honor, unpublished, but it --

QUESTION: But there -- but are there not cases where the Second Circuit has recognized this particular claim depends on extra-record material?

MR. FAHRINGER: Absolutely, Your Honor. Absolutely. As a matter of fact, what I think lends force

to our argument here is that even the Second Circuit acknowledged it, and yet they persist in holding to that narrow exception that it should be raised on direct appeal, and that narrow exception means that in every 2255 proceeding, a defendant must overcome what is a fairly -- a large hurdle of -- of cause and prejudice, and that's not true in the other -- in the other circuits, so we believe, on balance, the better rule, and the one that will more effectively administer justice, should be this one.

With that being said, I'd like to close by just simply urging the Court that since one of the most cherished policies of this Nation is that, and of the criminal justice system is that a person is entitled to the effective assistance of counsel, but if that right is rendered meaningless because if he's denied that safeguard, he has no effective remedy to cure it, then it seems to me the right has been sadly lost, and I would ask this Court to adopt the rule that we urge.

Thank you so much.

QUESTION: Do you wish to reserve your remaining time, Mr. Fahringer?

MR. FAHRINGER: Yes. Thank you, Mr. Chief Justice.

QUESTION: Yes. Mr. Srinivasan.

ORAL ARGUMENT OF SRIKANTH SRINIVASAN

ON BEHALF OF THE RESPONDENT

QUESTION: Mr. Srinivasan, suppose you start by telling us why the SG changed the position that it had -- that he had taken for so long on this point?

MR. SRINIVASAN: Justice O'Connor, the -- the Solicitor General's Office today, as before, believes that in the majority of the cases, in the overwhelming majority of the cases, claims asserting ineffective assistance of counsel will be better resolved on collateral review. The question has been whether the costs of applying a procedural default rule outweigh those benefits, and it has been our experience, with the application of the rule in the Second and Seventh Circuits over the past several years, that the administrative costs that initially were feared haven't -- haven't been borne out, and that the degree of uncertainty that initially led us to -- to reach the position that a procedural default rule should not be applied hasn't been borne out either.

QUESTION: So in effect you think that what's happening now in CA-2 and CA-7 is just fine?

MR. SRINIVASAN: In the main, we think that's correct, Justice O'Connor. It should not -- the rule's operation should not result in unfairness to defendants, and should not overload the courts with ineffectiveness

claims that are asserted prematurely on direct appeal.

QUESTION: How many cases are we talking about? I mean, it's the -- we're arguing about a sub-class of cases in which counsel changes between the trial and the direct appeal. Either in percentage terms or absolute terms, how many are we talking about?

MR. SRINIVASAN: Justice Souter, the best that we can tell, and this is based on essentially anecdotal reports of U.S. Attorney's Offices, it's somewhere on the order of 20 to 40 percent, roughly, of cases in which new counsel represents the defendant on appeal, but that -- I'd -- I hesitate to rely too much on that figure, because it is based on the anecdotal reports --

QUESTION: And --

MR. SRINIVASAN: -- and additionally, it varies significantly by locality, depending on the particular rules that are in place for replacement of counsel on appeal.

QUESTION: Within that 20 to 40 percent, whatever it may be, do you have any kind of a rough guess as to the number of instances of this issue that arise?

MR. SRINIVASAN: This issue?

QUESTION: I mean, how -- how many times within that 20 to 40 percent category do we get into an argument later on as to whether 2255 can be availed of because, in

fact, a -- a record was sufficiently developed to -- to raise the -- the claim on direct? How -- how many cases are there?

MR. SRINIVASAN: We don't -- we don't have the figures on that. We don't -- we don't track the figures by substantive claims, and so it's been difficult to come up with numbers that reflect the treatment of ineffectiveness claims in particular.

QUESTION: So it's -- it's hard to say what the sort of cost to the system, if there is one, would be of going one way or the other?

MR. SRINIVASAN: It's -- it's hard to say because there's no hard scientific data, and I --

QUESTION: Well, how could there be? I mean, what the problem is, is in a very small number of cases, hardly any, you have a case in the district court where the judge is serving as a habeas judge, and the Government in a very small number of cases comes in and makes the argument, judge, he cannot raise this ineffective assistance claim because he should have raised it on direct appeal, although he didn't, and then the cost to the system is hidden in the mind of the judge, in the minds of the lawyers who have to spend time briefing that and going and finding some affidavits, and trying to get around it.

I mean, how could you get empirical information, and what led you to change your opinion? Have you been investigating the minds of the judge or the minds of the lawyers in some way, that you know that they aren't actually aggravated, that you know that they aren't actually disturbed at having to waste their time on such an issue?

MR. SRINIVASAN: No, we haven't been conducting an examination of that.

QUESTION: Oh, I'm sure you haven't. I'm being a little facetious, but it seems to me it's not empirical data. The world won't come to an end if you lose this case. All it will do is save judges and lawyers a certain amount of time, which, if you win this case, they will have spent for no reason.

MR. SRINIVASAN: That -- Justice Breyer, it's correct that it saves time at the stage of collateral review, but the question for procedural default purposes is the effect of the rule at the time of direct appeal, and --

QUESTION: You could save no time on direct appeal, it's nothing. I mean, what we're talking about is cases where the person didn't raise the argument on direct appeal.

MR. SRINIVASAN: But the consequences of having

a procedural default rule is that it encourages the raising of ineffectiveness claims on direct appeal in any essential issues.

QUESTION: Yes, yes. Everybody will have to go and make the same argument twice. First they'll have to go and make the argument on direct appeal, a lot of them, and then they will have to remake the argument on collateral review, this time trying to explain why it's somehow different.

MR. SRINIVASAN: Justice Breyer, there are situations in which ineffectiveness claims can be raised and resolved on direct appeal, and --

QUESTION: There are.

QUESTION: Are there -- a fairly small number, I would assume?

MR. SRINIVASAN: It is a narrow category of cases, Justice O'Connor, but those cases do exist.

QUESTION: In any event, the AEDPA time limits apply, do they not, even if we followed a different rule?

MR. SRINIVASAN: As a -- that's correct, Justice O'Connor, the 1-year statute of limitations applies, but that's also true of other substantive claims, and yet the Court has continued to apply the cause in prejudice standard to encourage the raising of those claims at the earliest available opportunity, and that's the -- that's

the principal policy interest behind applying the procedural default rule in this context.

QUESTION: Is this just a Federal question, Mr. Srinivasan, or are -- does it carry over to cases going through State courts, too?

MR. SRINIVASAN: Mr. Chief Justice, the question before the Court is -- is purely a Federal question. The States have adopted varying approaches, as we've suggested in our briefs. A significant number of States require the raising of ineffectiveness claims on direct appeal, and judge the raising of an ineffectiveness claim on collateral review by a cause in prejudice standard.

QUESTION: Isn't it true that the majority of States go the other way?

MR. SRINIVASAN: The majority -- it appears that the majority of States go the other way, but it's not entirely clear, Justice Stevens, because some of the States haven't spoken directly on the question. What we -- what we know is that 19 States -- it was 20 at the time we filed our brief, but it's now 19, follow the cause in prejudice approach and require the raising of ineffectiveness claims on direct appeal, and there's at least a significant number of States that don't require the raising of ineffectiveness claims on direct appeal, but it's unclear whether there's more than 20, and so we

don't know exactly whether it's a majority or not, but -- but there at least are a significant number that apply procedural default principles to the raising of claims on direct appeal, and that's --

QUESTION: Am I right that the Government's position before the -- before we granted cert in this case was, this lack of uniformity is all right, that either rule will do, and that lawyers, defense lawyers in the Second Circuit will file the Second Circuit's rule, and defense lawyers in the Fifth Circuit will file the Fifth Circuit rule, and that was okay? Wasn't that the Government's original position -- you were never saying, it must be direct review if it's clear on the record?

MR. SRINIVASAN: Justice Ginsburg, our position was that there was no need for national uniformity in the sense that the Court need not grant review to impose a national -- national uniform rule. We didn't -- we thought that there was no unfairness in the existing divergence of approaches among the courts of appeals, because in each court of appeals, a defendant had notice of the particular approach that applied in that circuit, and so a defendant knew ahead of time whether he had to raise its ineffectiveness claim on direct appeal, or whether he could wait without penalty and raise it on collateral review.

QUESTION: So effectively, you told us not to bother with this case, but once we granted cert, then the Government had to take a position?

MR. SRINIVASAN: Correct, Justice Ginsburg. Now that the Court has granted certiorari, we think it would be appropriate for this Court to adopt a Nationwide rule similar to what the Court essentially did in Bousley, where the question was the proper time for raising an objection to a guilty plea on grounds that the plea was not voluntary, or -- or intelligent, and the Court reached a resolution that required the raising of those claims on direct appeal and adopted, it -- it appears, a Nationwide solution, and we think a similar approach would be appropriate in this case, that the Court should decide whether on a national scale ineffectiveness claims can always be brought on collateral review without any concerns about procedural default, or, as we think is appropriate, that ineffectiveness claims should be required to be raised on direct appeal in those situations in which counsel is new and the record -- the record for the claim is fully developed in the trial record.

QUESTION: One can imagine, if the requirement that the counsel be new in order to force you to raise it on direct appeal, that in itself could be the subject of controversy. That is, if you take a Public Defender

Office, and one Public Defender, one member of that office conducts the trial, and then another member of that office conducts the appeal, is that new counsel?

MR. SRINIVASAN: Justice Ginsburg, there -- there are decisions that address that issue in the State courts, and I believe at least a couple that address that issue in the Federal courts, and generally, the approach has been that defenders from the same Public -- attorneys from the same Public Defender's Office are considered the same attorney for purposes of conflict, determining whether there's a conflict in one alleging that the other rendered ineffective assistance.

And that, I think, comes from the ABA professional rules, and I -- and I believe it's Model Rule 1.1, which suggests that competence is imputed to attorneys that operate within the same firm, and that confirms that, at least for private firm purposes, two attorneys from the same firm would be considered to be the same attorney for procedural default -- default purposes, and we think the same approach would follow with respect to Public Defender's Offices, so I don't think that the question of the same attorney is going to give rise to a great deal of litigation or uncertainty. The rules in that area ought to be pretty clear.

QUESTION: Well, there's one aspect of the

Government's decision, now that it has to take a position one way or another. These questions, ineffectiveness of counsel, deal with what went on in the trial court, and ordinarily, the first view of such questions is taken by a court of first instance, not an appellate court, and yet here, the first look under the rules you are now supporting would be taken by an appellate court.

MR. SRINIVASAN: Justice Ginsburg, that's correct, but I think it's important to point out that that question, that situation is going to arise regardless of how this Court resolves the procedural default question, because in all the courts of appeals a defendant can raise an ineffective assistance claim on direct appeal.

QUESTION: What -- what is the procedure in the -- in the Federal system for a collateral -- collateral action, they have a claim that's ineffective. Does that go back to the judge who was the trial judge?

MR. SRINIVASAN: Typically, yes, that's the way 2255 works, Mr. Chief Justice.

QUESTION: May I ask, under the Second Circuit rule, if the defendant is represented by the Public Defender's Office in the trial court, and then on appeal, the Public Defender's Office continues to represent him but by a different lawyer, they have different -- does that -- is that a different lawyer within the meaning of

the Second Circuit rule, or is it the same lawyer?

MR. SRINIVASAN: No, I think as I was -- as I was attempting to suggest in response to Justice Ginsburg's question, I think that would be considered the same attorney, and that follows from conflicts principles.

QUESTION: I see.

MR. SRINIVASAN: That attorneys within the same office are considered to be the same attorney for purposes of conflicts, and that informs the proper approach in -- in the procedural default inquiry, but I think it's important to note that all the courts of appeals are confronted with ineffective assistance claims that are raised on direct appeal. No court of appeals prohibits the assertion of an ineffectiveness claim on direct appeal, so in every court, the court of appeals is faced with one of three options at the time an ineffectiveness claim is raised.

They can deny the claim on the merits if they can conclude that in no circumstances the claim could succeed, they could grant relief on ineffectiveness grounds in the narrow category of cases in which entitlement to relief will be apparent from the trial record, or they could decline to resolve the claim and remit its resolution to 2255, and that's precisely the same three options that confront the Second Circuit and

the Seventh Circuit, who apply the procedural default rule.

So Justice Ginsburg, in response to your question, the courts of appeals are faced with the same array of options whether this Court adopts a procedural default principle or not, and in the Ninth Circuit, for example, in 2001, the Court faced roughly on the order of 50 direct appeals in which ineffective assistance of counsel was asserted as a basis for relief, and in 10 of those cases, the Court was able to decide conclusively that the claim was lacking in merit and therefore couldn't be brought again under 2255, and --

QUESTION: Then the court of appeals can always say, we think it would be better to have this aired in the -- in the court of first instance, so there will be no prejudice to our rejecting it now, you can bring it in 2255, but the one that -- the concern here is the defendant and his new counsel, whether the new counsel can safely say, if I have any doubt, I'm going to hold it back to the 2255, and one point that was made was that on direct appeal, it's important for the appellate counsel to have the cooperation of the trial lawyer to help him go through the record and point out possible grounds for appeal.

But if the new counsel is going to insert

ineffective assistance of counsel at that stage, it will make the relationship between trial and appellate counsel rather tense, will it not?

MR. SRINIVASAN: That -- that possibility certainly is there, Justice Ginsburg, but I think the same possibility arises at the time of collateral review, when the attorney -- when you'd expect the attorney equally to desire the cooperation of trial counsel, but any effort to assert ineffectiveness could create the same sort of tension in the relationship.

QUESTION: Mr. Srinivasan, do you have any idea of what percentage of cases, of criminal convictions result in inadequate assistance of counsel claims? Is it 90 percent of them, 50 percent of them, what? Do we know?

MR. SRINIVASAN: I -- I don't have statistics of that variety, Justice O'Connor. I think it's been generally recognized by several courts that ineffective assistance claims are often raised on collateral review, and I think it's fair to say that in a significant portion of -- of 2255 petitions, an ineffective assistance of counsel claim will be at least one ground for relief.

And one effect of applying a procedural default principle would be to encourage the raising and resolution of those claims on direct appeal in those situations in which it's appropriate, and I think it's important to

point out that there are at least some cases in which a court of appeals can resolve, on the basis of the trial record, that the -- that trial counsel either was or was not ineffective, and this Court, for example, in its -- in its Kimmelman decision, the -- pointed out that trial counsel's ineffectiveness, at least in terms of the performance prong of the Strickland inquiry, was apparent from the trial record, and there will be situations like that that arise every so often, and perhaps more frequently an appellate court will be able to determine that trial counsel's performance was not ineffective and will be able to make that determination perhaps because, no matter how deficient the performance was, the -- the particular matter at issue could never have resulted in prejudice for the defendant.

For example, if the claim of ineffectiveness is that trial counsel was ineffective in failing to competently impeach a particular witness, an appellate court could perhaps look at the trial record and determine that the testimony of that particular witness was not central to the prosecution's case, and in those circumstances, could a more effective impeachment have given rise to a reasonable probability that the result at trial would have been different.

So there are going to be some situations in

which a court of appeals can resolve an ineffectiveness claim at the time of direct appeal, and in those situations, it seems appropriate to encourage the raising of the claim at that stage in order to promote respect for the finality of criminal judgments and also to promote the resolution of legal claims at the earliest feasible opportunity.

QUESTION: Under your rule, as I understand it, new appellate counsel has the obligation to search through the record to show, to find ineffective assistance of counsel, and the trial counsel doesn't have that obligation. That, number one, seems to me a little bit arbitrary and, secondly, I'm wondering if that might not itself have an effect on how often petitioner gets new appellate counsel as opposed to having his trial counsel. Do you think there might be some effect of this rule on the decision to retain new counsel at the appellate stage?

MR. SRINIVASAN: We're not aware that --

QUESTION: Or maybe even some gamesmanship playing, where that trial counsel is counsel of record, but he really gets new appellate counsel to help him out?

MR. SRINIVASAN: Well, we're not aware of any -- of any effect of that sort in either the Second or Seventh Circuits which apply the procedural default rule, and -- and I think if trial counsel's involved in the

gamesmanship, one would have to conceive of a situation in which trial counsel found it in his interest to ensure that appellate counsel could confirm his ineffectiveness at trial, and that situation perhaps is unlikely to arise.

And in terms of the distinction between appellate counsel calling into question trial counsel's ineffectiveness, and trial counsel calling into question his own ineffectiveness, Justice Kennedy, this Court in Kimmelman observed what I think would -- is a common sense proposition, which is that trial counsel is unlikely to bring into question his own competence at trial and, in fact, he would -- he would create a conflict situation, and therefore the system just doesn't operate on the assumption that trial counsel should be required to identify his own ineffectiveness and bring it to the attention of the trial court.

QUESTION: What about Mr. Fahringer's point that if you follow your rule, you're going to get a second generation of ineffective assistance claims, that is, that the counsel who didn't raise or did raise something on appeal was ineffective?

MR. SRINIVASAN: Mr. Chief Justice, it's true that -- that ineffective assistance of appellate counsel is -- would constitute cause for failing to raise the claim of ineffective assistance of trial counsel at -- on

direct appeal, that that is also true in -- with all other substantive claims, that ineffective assistance of trial counsel for failing to raise any substantive claim at the time of direct appeal could constitute cause excusing the default, yet this Court has continued to apply procedural default principles in the case of other substantive claims, and so I'm not sure that that particular consideration tips the balance decidedly in one direction or the other.

And in fact, the Court has made clear in decisions such as Murray versus Carrier and Smith versus Murray, and -- and recently in Smith versus Robbins, that it's difficult to make out a claim of ineffective assistance of appellate counsel because appellate counsel's decision whether to raise a particular claim is the hallmark of effective advocacy, and one would have to show that appellate counsel was unreasonable in failing to present one claim instead of another at the time of appellate briefing in order to establish that there was cause for failing to raise ineffective assistance of trial counsel at the time of direct appeal.

QUESTION: Of course, the Government loses one thing on -- on your theory in -- in certainly some of the ineffective assistance records I've had here, or seen here where the -- the issue arises whether, in fact, an

apparently foolish move on the part of trial counsel was dictated by what ultimately was a very sensible tactical reason which is not apparent on the face of the record.

In cases like that, the Government isn't going to get a chance, in effect, to make that kind of rebuttal if the issue is raised on -- on direct. The Government simply won't know.

MR. SRINIVASAN: Justice Souter, the Government won't get that chance if it's resolved on direct appeal. If it's raised on direct appeal, the Government, of course, shares an interest in assuring that the trial court -- that the appellate court, excuse me, does not resolve the claim because it would say --

QUESTION: No, but you run the -- there's no question the -- but the -- the trial court may not give you the chance. I mean, you run a risk that you're going to get cut short on your opportunity to get trial counsel to explain what may look like a very dumb thing on the -- on the record.

The risk you run is that the trial -- that the -- that the appellate court on direct appeal is going to say, this was crazy, no -- you know, there -- there couldn't be any sensible explanation for this, and I -- I don't understand -- I don't know, just as we were saying before, there's no way to tell how -- how frequently a

situation like this will arise, because we don't have any hard statistics on any of it, but I -- I don't know why you're giving that up.

MR. SRINIVASAN: Well, in order to ameliorate that possibility, Justice Souter, the Seventh Circuit, for example, has adopted a standard under which it will not decide a claim of ineffectiveness in the defendant's favor unless there's no possible strategic rationale for counsel's decision and, of course, to the extent that there may be a strategic rationale for the counsel's decision, it'll be in the Government's interest to bring that to the court's attention in its appellate briefing, and we haven't seen too many situations in which a court grants a claim of ineffectiveness on direct appeal, but yet there was potentially a strategic rationale for counsel's decision.

In fact, the court should grant relief on ineffectiveness grounds on direct appeal only in situations such as the one that confronted the Court in Kimmelman, where there was an extended dialogue between trial counsel and the trial court concerning trial counsel's assertively deficient decision --

QUESTION: I --

MR. SRINIVASAN: -- and trial counsel was able to explain to the trial court the basis of its decision,

and from trial counsel's explanation, one could determine that it wasn't based on a strategic rationale, but instead was based simply on a misunderstanding of the time, of the timeliness of the rejection rule that was at issue.

QUESTION: In a collateral proceeding, Mr. Srinivasan, you're developing evidence, you have the trial -- you put the trial counsel on the stand and the new counsel cross examines him to see -- prove how badly he did?

MR. SRINIVASAN: That -- that could arise, Mr. Chief Justice. That's -- that's one potential evidentiary way to show that trial counsel was ineffective.

QUESTION: And is there any limit on the -- can you, you know, examine the trial counsel for his mental processes and that sort of thing?

MR. SRINIVASAN: I'm not -- I don't know the answer to that, Mr. Chief Justice. I don't know to what extent privileges weigh into it.

QUESTION: But the Government frequently in these cases elicits testimony in response from the trial counsel saying, well, yeah, I -- I didn't ask the question because I didn't want to get into this sort of subject, so I mean that --

MR. SRINIVASAN: That's correct.

QUESTION: -- I take it, is a relatively common feature in these cases.

MR. SRINIVASAN: That's -- that's correct, Justice Souter. It's in the Government -- the Government does do that, and it's in their interest to do that to ensure that the result of trial is upheld.

QUESTION: There are no privilege problems, are there -- or maybe I'm wrong -- if -- if the client himself has the new attorney examine the old one. He waives the privilege.

MR. SRINIVASAN: I think that's right, Justice Kennedy.

If I could turn just for one moment to the application of a procedural default rule to the facts of this case, in -- if the procedural default rule were to be applied, the question at the time of collateral review is whether -- is whether the defendant has introduced extrinsic evidence not available in the trial record in support of this claim of ineffectiveness, and the court of appeals in this case found that there was no extrinsic evidence material to the claim of ineffectiveness introduced in the affidavits on which the petitioner relies because the affidavits suggests avenues of inquiry the trial counsel could have pursued that trial counsel in fact did pursue.

For example, on the facts of this particular case, that there was no blood spatter remaining from the wound, and that -- that no blood spatter reflected on the upholstery of the car, or no blood itself on the front passenger seat, or that the body of the -- the position of the body wasn't consistent with the testimony concerning the firing of the second shot, and I think it's important to point out that in all of those avenues were, in fact, explored by the trial record -- excuse me, by trial counsel, and were presented to the jury, and the jury evidently found them not persuasive.

QUESTION: And yet the -- the trial judge herself said to defense counsel, aren't you going to move for a continuance, when this bullet came -- was unearthed after all that time. Didn't she, a couple of times, hint that it would be -- might be a good idea for defense counsel to seek a continuance?

MR. SRINIVASAN: She did. She offered a continuance on a few occasions to trial counsel, and trial counsel turned it down, but I think the defendant's burden at the time of collateral review now is to show that the refusal of a continuance worked to the defendant's detriment and resulted in a reasonable probability that the result at trial would have been different had he -- had he accepted a continuance, and the affidavits only

present avenues of inquiry that trial counsel in fact pursued, which indicates, and I think in some sense confirms, that a continuance would not have affected the results at trial.

If there are no further questions, Mr. Chief Justice --

QUESTION: Thank you, Mr. Srinivasan.

Mr. Fahringer, you have 14 minutes left.

REBUTTAL ARGUMENT OF HERALD P. FAHRINGER

ON BEHALF OF THE PETITIONER

MR. FAHRINGER: Mr. Chief Justice, I don't think I'm going to have to use them, but let me go right to this matter of prejudice.

The Court should understand that the district court, nor the court of appeals, decided the prejudice issue. This was decided purely on procedural ground that there was a sufficient record to raise it on appeal, and what I think it's important for you to understand is that although in the trial record you had the justice pleading with defense counsel to take a continuance, investigate this bullet that became the most important piece of evidence in the case -- the prosecutor stated that in the Second Circuit, this was our most important piece of evidence. That became the pivotal point of the trial, and -- and the affidavits don't simply talk about avenues

the defense lawyer should have taken, what the affidavits say is that it is highly unlikely that this bullet was fired in that car, and they say that it is not consistent with the chief and one and only witness that was involved in the homicide, so what was missing, the indispensable component for an ineffectiveness claim was the prejudice. That was not on the record. What you had is, you're not taking an adjournment, but all you have in the record is, the bullet and the prosecution's proof.

QUESTION: Of course, we're not trying to decide here whether --

MR. FAHRINGER: No.

QUESTION: -- or not this claim should be sustained or rejected.

MR. FAHRINGER: No, I -- you're -- Mr. Chief Justice, I agree. What I would like to say is, I think the Solicitor General is mistaken when he responded to your question and said that there would still be ineffectiveness claims against appellate counsel. If this Court adopts the rule that a ineffectiveness claim can be brought under 2255 and does not have to be first explored in those few cases on direct appeal, then there certainly can be no claim made against appellate counsel for not raising that claim.

The other issue that's been identified here,

which is one of some moment, is new counsel. The -- the Second Circuit has held in a case, it's unreported so I won't discuss it, but you should know that there's a holding that the Legal Aid Society, when it went over to the Appeals Bureau, that was a different lawyer, even though it was the same society, so it -- it is -- there's ambiguity there, too.

What if the trial lawyer goes out and gets what he thinks is a good appellate lawyer to come in Of Counsel with him, and the new appellate lawyer comes in and he sees the colleague who brought him into the case has got -- I mean, it just is generating one complexity after another.

If you look at the Seventh Circuit rule, they have put so many exceptions onto this, as has been identified, that -- that it's just becoming I think unmanageable and the rule is becoming unadministratable, and for that reason it cries out for a new rule.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fahringer. The case is submitted.

(Whereupon, at 10:58 a.m., the case in the above-entitled matter was submitted.)